Kumpulan Prasarana Rakyat Johor Sdn Bhd v Emercon Bina Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02(NCVC)(W)-329–02 OF 2018 AND J-02(NCVC)(W)-330–02 OF 2018

VERNON ONG, ABDUL RAHMAN SEBLI FCJJ AND NOR BEE ARIFFIN JCA

1 SEPTEMBER 2020

Contract — Breach — Breach of agreement — Plaintiff claimed for damages — Whether defendant responsible to ensure surrender and re-alienation of project land — Whether deed of settlement was acknowledgement of liability — Whether transfer of project land qualified as supervening event — Whether plaintiff entitled to damages awarded

After a full trial, the learned judicial commissioner ('JC') allowed the respondent's ('plaintiff') claim against the appellant ('defendant') for breach of a joint venture agreement and awarded general damages for loss of profits in the sum of RM25,107,560 with 5% interest per annum from the date of judgment until full settlement. Appeal No 329 was the defendant's appeal against the whole decision of the learned JC. Appeal No 330 was the plaintiff's appeal against part of the decision of the learned JC that allowed only one-half of the damages claimed by the plaintiff based on the alternative claim of damages. The plaintiff was a property developer and the defendant was a private limited company wholly owned by the Johor State Government ('the state government'). The defendant's board of directors was chaired by the Menteri Besar of Johor ('MB'). By letters from the Pentadbir Tanah Johor Bahru and Pejabat Tanah dan Galian, Johor ('PTG's letters'), the defendant was informed that the Majlis Mesyuarat Kerajaan Negeri Johor ('MMKN') had agreed to alienate to the defendant the lands PTB 17819, PTB 18145, Lot 20785 and Lot 20784. The defendant subsequently became the registered owner of those four pieces of land. The alienation to the defendant was for building and there must be application for surrender and realienation, the lands were alienated to the defendant for development. As per the PTG's letters, the defendant was required to apply for surrender and re-alienation of the lands prior to the development. The defendant executed an agreement with Bitara Mawar Sdn Bhd ('Bitara') ('the development agreement') to develop the four lands and Lot 19774 in respect of a proposed development project ('the project'). These four lands and Lot 19774 constituted the project land. On the same date the plaintiff executed an assignment agreement with Bitara ('the assignment agreement') to take over all Bitara's rights, obligations and liabilities under the development agreement. The plaintiff said they were induced into executing

the assignment agreement by the oral assurances given by the defendant's then chief executive officer ('Dato Amirullah'). The plaintiff said the oral assurances formed a binding collateral agreement between the plaintiff and the defendant. Moving on with the project, the defendant made an application for surrender and re-alienation of the project land to the PTG. However, the application was rejected. The plaintiff and Bitara requested the defendant to appeal to the MB against the said decision. The defendant appealed not to the MB but to the PTG. The PTG in turn advised the defendant to appeal directly to the MB. The defendant did not heed to the PTG's advice. Whilst these were going on, unknown to the plaintiff or Bitara, the MMKN was said to have agreed in principle to transfer part of the project land to a third party. A letter from Unit Perancang Ekonomi Negeri Johor ('UPEN') to Johor Corp ('Johor Corp') and copied to the defendant, showed it was agreed amongst others, that Johor Corp was to take over the defendant's debt of RM70m then owed to Perwira Affin Bank and as consideration thereof, the defendant's lands including part of the project land would be given to Johor Corp. Following the letter, the defendant and Bitara entered into a supplemental agreement to replace the project land and the transfer of part of the project land took effect. The plaintiff filed a suit against the defendant ('the first suit') seeking damages for breach of the development agreement and the collateral agreement. However, it did not proceed as in an attempt to settle the first suit, the plaintiff and the defendant entered into a deed of settlement to replace the project land with two pieces of land ('the Bukit Tempurung land'). The plaintiff found the Bukit Tempurung land not viable for development and the plaintiff then filed another suit. The defendant proposed a further settlement wherein the deed of settlement would continue to remain in force and that the defendant would look again for a suitable substitute land. However, the defendant did not manage to procure a suitable substitute land and the plaintiff re-filed the claim. The learned JC allowed the claim and hence these appeals.

Held, dismissing appeal No 329 and allowing appeal No 330:

(1) His Lordship had given sufficient judicial appreciation by evaluating the evidence and demeanour of the defendant's witnesses. The learned JC had correctly invoked the adverse inference under s 114(g) of the Evidence Act 1950 that the evidence by Dato Amirullah, if tendered, would be adverse or unfavourable against the defendant. By the defendant's judicial admissions, their legal arguments that the learned JC ought to have rejected the oral assurances on the basis that the same contravened the principles of parol evidence as provided under ss 91 and 92 of the Evidence Act 1950, and there was an absence of a consideration, were unsustainable. Section 5.2 of the development agreement envisaged the plaintiff to make the application for surrender and re-alienation. However, the condition placed by the MMKN vide PTG's letters showed that the MMKN had specifically required the defendant to make such

application. The PTG's letters and para 7 of the statement of defence actually had put to rest the issue as to who was responsible to make the application for the surrender and re-alienation of the project land. In the face of the direction of the MMKN, no other party could make the application other than the defendant. As the application for the surrender and realienation of the project land was made by the defendant, it was misconceived to suggest that the defendant could invoke section 3.2(1)(a) of the development agreement so as to curtail the extent of the defendant's duty with regard to the said application. The collateral agreement thus made up the whole contract between the parties so as to enable the defendant to proceed with the submission of the application for the surrender and re-alienation. Oral evidence was thus admissible to prove the collateral agreement. It followed therefore that the absence of consideration was a non-issue. There was also no merit in the defendant's argument that the oral assurances were incredulous because the defendant could not speak for the state government and to give assurances of such nature. The defendant had only themselves to blame when they made the choice not to call Dato Amirullah to rebut the plaintiff's case on the said oral assurances for the learned JC to consider. The defendant's inexplicable reluctance to appeal to the MB till the end and the insistence on appealing to the PTG was baffling. The defendant was under a contractual obligation to get the matter re-considered. The positive and reasonable steps the defendant should have taken to procure the surrender and re-alienation of the project land, was to appeal to the MB or to meet up with Johor Corp as suggested by UPEN. By refusing to do one or the other, the defendant could not claim that they had fulfilled the duty and obligation required of them (see paras 90, 92, 97, 99, 102–105, 137, 139 & 143).

(2) The supplemental agreement was not valid. By transferring the project land to Johor Corp, there was no possibility for the development agreement proceeding as the defendant had by such act of transferring, disabled themselves from performing their obligations under the development agreement. The transfer had caused the project to fail. The learned JC had rightly said that the breach was caused by the defendant as a matter of choice. Neither did the learned JC err when he held that the deed of settlement was an acknowledgement of a liability on the part of the defendant. The deed of settlement had to be construed on its express terms and it was clearly intended by the deed of settlement that the parties were preserving the first suit. The parties agreed to explore the possibility of resolving the plaintiff's claims against the defendant in the first suit. The deed of settlement was an admission by the defendant of their obligations to the plaintiff under, and of its breach of, the development agreement. There was simply no reason why the defendant would have gone to such an extent to procure substitute lands if it was not

to settle the plaintiff's claim against them for the breach of the development agreement (see paras 146–150 & 171).

(3) The defendant could not anchor their case on the ground of frustration. When the application submitted by the defendant was rejected, the matter could not end there. It could not be conceded that the rejection of the application for surrender and re-alienation of the project land was entirely through no fault of the defendant and qualified as a supervening event. The defendant was under no legal obligation to transfer the project land simply because they were told to do so by the MMKN. The direction of the MMKN was not a supervening event. The defendant had refused to perform their end of the bargain by self-induced frustration and therefore could not avail themselves of the defence of frustration (see paras 177, 180 & 185–186).

(4) The plaintiff's profit from the development was well within the contemplation of the defendant. The defendant had without qualification, agreed to the computations. Thus, it was not open to them now to submit that the assessment was speculative and conjecture or projection which was not sufficient to prove loss of profits. The plaintiff's claim could not at any rate be considered remote or untenable. The loss of profit the plaintiff would suffer was the natural and probable result of the defendant's breach of the development agreement. The loss of profit claimed by the plaintiff was reasonably contemplated by the defendant at the time of the making of the contract. There was no evidence adduced by the defendant to the contrary. The defendant must be estopped from changing course. There was no error of judgment on His Lordship's finding that the plaintiff had proven that they were entitled to loss of profit. However, the learned JC was plainly in error when, after he had made a finding that the lower sum of RM50,215,120 as loss of profit was proven, he proceeded to revise downwards the loss of profit by one-half. The learned JC had taken into account factors that were irrelevant, unproven, speculative and not raised at trial and in wrongly invoking judicial notice of there being the high possibility of slow sales due to glut or oversupply in Johor Bahru market. The adjustment clearly contradicted his earlier finding. The error committed by the learned JC warranted appellate intervention (see paras 197, 201–202 & 206–208).

[Bahasa Malaysia summary

Setelah perbicaraan penuh, pesuruhjaya kehakiman ('PK') yang bijaksana membenarkan tuntutan responden ('plaintif') terhadap perayu ('defendan') kerana melanggar perjanjian usaha sama dan mengawardkan ganti rugi am kerana kehilangan keuntungan dalam jumlah RM25,107,560 dengan faedah 5% setahun dari tarikh penghakiman sehingga penyelesaian penuh. Rayuan No 329 adalah rayuan defendan terhadap seluruh keputusan PK yang bijaksana. Rayuan No 330 adalah rayuan plaintif terhadap sebahagian

keputusan PK yang bijaksana yang hanya membenarkan setengah daripada ganti rugi yang dituntut oleh plaintif berdasarkan tuntutan ganti rugi alternatif. Plaintif adalah pemaju harta tanah dan defendan adalah syarikat sendirian berhad yang dimiliki sepenuhnya oleh Kerajaan Negeri Johor ('kerajaan negeri'). Lembaga pengarah defendan diketuai oleh Menteri Besar Johor ('MB'). Melalui surat-surat dari Pentadbir Tanah Johor Bahru dan Pejabat Tanah dan Galian, Johor ('surat PTG'), defendan diberitahu bahawa Majlis Mesyuarat Kerajaan Negeri Johor ('MMKN') telah bersetuju untuk memberi milik tanah kepada defendan PTB 17819, PTB 18145, Lot 20785 dan Lot 20784. Defendan kemudiannya menjadi pemilik berdaftar bagi empat bidang tanah tersebut. Pemberian milik kepada defendan adalah untuk pembinaan dan harus ada permohonan penyerahan dan pemberian milik semula, tanah-tanah tersebut diberikan kepada defendan untuk pembangunan. Menurut surat PTG, defendan diminta untuk memohon untuk penyerahan dan pemberian milik semula tanah sebelum pembangunan. Defendan melaksanakan perjanjian dengan Bitara Mawar Sdn Bhd ('Bitara') ('perjanjian pembangunan') untuk membangunkan empat tanah dan Lot 19774 berkenaan dengan projek pembangunan yang dicadangkan ('projek'). Keempat tanah dan Lot 19774 ini merupakan tanah projek. Pada tarikh yang sama, plaintif melaksanakan perjanjian penyerahhakan dengan Bitara ('perjanjian penyerahhakan') untuk mengambil alih semua hak, kewajiban dan liabiliti Bitara di bawah perjanjian pembangunan. Plaintif mengatakan bahawa mereka didorong untuk melaksanakan perjanjian penyerahhakan dengan jaminan lisan yang diberikan oleh ketua pegawai eksekutif defendan ('Dato Amirullah'). Plaintif mengatakan jaminan lisan membentuk perjanjian sampingan yang mengikat antara plaintif dan defendan. Meneruskan dengan projek tersebut, defendan membuat permohonan penyerahan dan pemberian milik semula tanah projek kepada PTG. Walau bagaimanapun, permohonan itu ditolak. Plaintif dan Bitara meminta defendan untuk merayu kepada MB terhadap keputusan tersebut. Defendan tidak memohon kepada MB tetapi kepada PTG. PTG selepas itu menasihati defendan untuk membuat rayuan terus kepada MB. Defendan tidak menghiraukan nasihat PTG. Sementara ini sedang berlangsung, tidak diketahui oleh plaintif atau Bitara, MMKN dikatakan telah secara prinsip bersetuju untuk memindahkan sebahagian dari tanah projek itu kepada pihak ketiga. Sepucuk surat dari Unit Perancang Ekonomi Negeri Johor ('UPEN') kepada Johor Corp ('Johor Corp') dan salinan kepada defendan, menunjukkan bahawa antara lain telah dipersetujui, bahawa Johor Corp akan mengambil alih hutang defendan sebanyak RM70 juta yang terhutang kepada Perwira Affin Bank dan sebagai pertimbangannya, tanah defendant termasuk sebahagian tanah projek akan diserahkan kepada Johor Corp. Berikutan surat itu, defendan dan Bitara menandatangani perjanjian tambahan untuk mengganti tanah projek dan pemindahan sebahagian tanah projek berlaku. Plaintif memfailkan saman terhadap defendan ('saman pertama') yang menuntut ganti rugi kerana melanggar perjanjian pembangunan dan perjanjian sampingan. Namun, ia tidak

diteruskan kerana dalam usaha untuk menyelesaikan saman pertama, plaintif dan defendan memasuki surat ikatan penyelesaian untuk mengganti tanah projek dengan dua bidang tanah ('tanah Bukit Tempurung'). Plaintif mendapati tanah Bukit Tempurung tidak sesuai untuk dibangunkan dan plaintif kemudian memfailkan saman lain. Defendan mencadangkan penyelesaian selanjutnya di mana surat ikatan penyelesaian terus berkuatkuasa dan defendan akan mencari tanah ganti yang sesuai. Namun, defendan tidak berjaya mendapatkan tanah ganti yang sesuai dan plaintif memfailkan semula tuntutan tersebut. PK yang bijaksana membenarkan tuntutan tersebut dan oleh itu rayuan ini.

Diputuskan, menolak rayuan No 329 dan membenarkan rayuan No 330:

(1) Yang Arif telah memberikan penghargaan kehakiman yang cukup dengan menilai bukti dan perlakuan saksi-saksi defendan. PK yang bijaksana dengan betul mengemukakan inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 bahawa keterangan oleh Dato Amirullah, jika ditender, akan bertentangan atau tidak berpihak terhadap defendan. Dengan pengakuan kehakiman defendan, hujahan undang-undang mereka bahawa PK yang bijaksana seharusnya menolak jaminan lisan dengan alasan bahawa hal itu bertentangan dengan prinsip keterangan parol seperti yang diperuntukkan di bawah ss 91 dan 92 Akta Keterangan 1950, dan tidak ada pertimbangan, tidak dapat dikekalkan. Seksyen 5.2 perjanjian pembangunan menyatakan plaintif untuk membuat permohonan penyerahan dan pemberian milik semula. Namun, syarat yang dibuat oleh MMGN melalui surat PTG menunjukkan bahawa MMKN secara khusus mewajibkan defendan untuk membuat permohonan tersebut. Surat-surat PTG dan perenggan 7 pernyataan pembelaan sebenarnya telah menyelesaikan persoalan mengenai siapa yang bertanggungjawab untuk membuat permohonan penyerahan dan pemberian milik semula tanah projek. Dengan arahan MMKN, tidak ada pihak lain yang dapat membuat permohonan selain defendan. Oleh kerana permohonan penyerahan dan pemberian milik semula tanah projek dibuat oleh defendan, maka disalah anggap untuk mencadangkan defendan dapat membangkitkan seksyen 3.2(1)(a) perjanjian pembangunan untuk membataskan tahap tugas defendan berkenaan dengan permohonan tersebut. Oleh itu, perjanjian sampingan merangkumi keseluruhan kontrak antara pihak bagi membolehkan defendan untuk meneruskan serahan permohonan penyerahan dan pemberian milik semula. Dengan itu, keterangan lisan boleh diterima untuk membuktikan perjanjian sampingan. Maka, ketiadaan pertimbangan adalah bukan isu. Tidak ada merit dalam hujahan defendan bahawa jaminan lisan itu mencurigakan kerana defendan tidak dapat berbicara untuk pemerintah negeri dan memberikan jaminan yang serupa. Defendan sendiri yang harus dipersalahkan ketika mereka

membuat pilihan untuk tidak memanggil Dato Amirullah untuk membantah kes plaintif atas jaminan lisan tersebut untuk dipertimbangkan oleh PK yang bijaksana. Keengganan defendan untuk tidak mengemukakan rayuan kepada MB dan desakan untuk merayu kepada PTG adalah membingungkan. Defendan berada di bawah kewajiban kontraktual agar perkara itu dipertimbangkan semula. Langkah positif dan wajar yang harus diambil oleh defendan untuk mendapatkan penyerahan dan pemberian milik semula tanah projek, adalah dengan merayu kepada MB atau bertemu dengan Johor Corp seperti yang disarankan oleh UPEN. Dengan menolak untuk melakukan satu atau yang lain, defendan tidak dapat mendakwa bahawa mereka telah memenuhi tugas dan kewajiban yang diperlukan dari mereka (lihat perenggan 90, 92, 97, 99, 102–105, 137, 139 & 143).

(2) Perjanjian tambahan adalah tidak sah. Dengan memindahkan tanah projek itu ke Johor Corp, tidak ada kemungkinan perjanjian pembangunan berjalan kerana defendan dengan tindakan pemindahan tersebut, membatalkan diri dari melaksanakan kewajiban mereka berdasarkan perjanjian pembangunan. Pemindahan tersebut menyebabkan projek tersebut gagal. PK yang bijaksana dengan tepat mengatakan bahawa pelanggaran itu disebabkan oleh defendan sebagai pilihan. PK yang bijaksana tidak juga terkhilaf ketika beliau menyatakan bahawa surat ikatan penyelesaian adalah pengakuan terhadap liabiliti defendan. Surat ikatan penyelesaian harus ditafsirkan dengan terma nyata dan jelas dimaksudkan oleh surat ikatan penyelesaian bahawa pihak-pihak memegang saman pertama. Pihak-pihak bersetuju untuk meneroka kemungkinan menyelesaikan tuntutan plaintif terhadap defendan dalam saman pertama. Surat ikatan penyelesaian adalah pengakuan oleh defendan atas kewajiban mereka kepada plaintif di bawah, dan pelanggarannya, perjanjian pembangunan. Tidak ada alasan mengapa defendan akan sejauh mungkin untuk mendapatkan tanah ganti jika tidak untuk menyelesaikan tuntutan plaintif terhadap mereka atas pelanggaran perjanjian pembangunan (lihat perenggan 146–150 & 171).

(3) Defendan tidak dapat menyokong kes mereka dengan alasan kegagalan. Apabila permohonan yang dikemukakan oleh defendan ditolak, perkara itu tidak berakhir di situ. Tidak dapat diakui bahawa penolakan permohonan penyerahan dan pemberian milik semula tanah projek sepenuhnya bukan kerana kesalahan defendan dan memenuhi syarat sebagai kejadian supervening. Defendan tidak berkewajiban untuk memindahkan tanah projek hanya kerana mereka diberitahu oleh MMKN. Arahan MMKN bukanlah kejadian supervening. Defendan telah menolak untuk melaksanakan kewajiban mereka dengan kegagalan yang disebabkan oleh diri sendiri dan oleh itu tidak dapat memanfaatkan pembelaan kegagalan (lihat perenggan 177, 180 & 185–186).

(4) Keuntungan plaintif dari pembangunan selaras dengan pertimbangan defendan. Defendan tanpa syarat, berdetuju dengan pengiraannya. Oleh itu, tidak terbuka bagi mereka sekarang untuk menyatakan bahawa penilaian itu bersifat spekulatif dan sangkaan atau unjuran yang tidak mencukupi untuk membuktikan kerugian keuntungan. Tuntutan plaintif sama sekali tidak boleh dianggap jauh atau tidak dapat dikendalikan. Kehilangan keuntungan yang akan ditanggung oleh plaintif adalah hasil yang wajar dan berkemungkinan dari pelanggaran defendan terhadap perjanjian pembangunan. Kerugian keuntungan yang dituntut oleh plaintif telah dipertimbangkan secara wajar oleh defendan pada saat pembuatan kontrak. Tidak ada keterangan yang dikemukakan oleh defendan sebaliknya. Defendan harus dihindarkan daripada menukar haluan. Tidak ada kesalahan penghakiman atas keputusan Yang Arif bahawa plaintif telah membuktikan bahawa mereka berhak terhadap kehilangan keuntungan. Walau bagaimanapun, PK yang bijaksana jelas terkhilaf ketika, setelah beliau membuat keputusan bahawa jumlah yang lebih rendah dari RM50,215,120,00 sebagai kerugian keuntungan terbukti, beliau terus mengkaji penurunan keuntungan sebanyak setengah. PK yang bijaksana telah mempertimbangkan faktor-faktor yang tidak relevan, tidak terbukti, spekulatif dan tidak dibangkitkan pada perbicaraan dan dengan salah membangkitkan notis kehakiman kemungkinan besar penjualan lambat disebabkan oleh kekurangan atau kelebihan bekalan di pasar Johor Bahru. Pelarasan itu jelas bertentangan dengan penemuan sebelumnya. Kesalahan yang dilakukan oleh PK yang bijaksana memerlukan campur tangan rayuan (lihat perenggan 197, 201–202 & 206–208).]

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC (refd)

BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and another appeal [2018] 3 MLJ 326, CA (refd)

Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411, CA (refd)

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76; [1993] 2 CLJ 495, SC (distd)

Bank Muamalat Malaysia Berhad v Sophisticated Pipe Industry Production Sdn Bhd [2011] 9 CLJ 748, HC (refd)

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Gan Jin Sim @ Gan Gim Sim (as administrator of the estate of Gan Lai Kim, deceased) v Swi Chuan @ Nan Swu Chuan & Ors [2017] 1 MLJ 794, CA (refd)

A *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)
Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201, CA (refd)
Hadley v Baxendale (1854) 9 Exch 341 (refd)
B *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)
KS Energy Services Ltd v BR Energy (M) Sdn Bhd [2014] 2 SLR 905, CA (refd)
Kin Nam Development Sdn Bhd v Khau Daw Yau [1984] 1 MLJ 256; [1984] 1 CLJ Rep 181, FC (refd)
C *Krishnan Nambiar s/o Perabakaran & Ors v Dr P Mahendran & Anor* [2009] 4 MLJ 267, HC (refd)
Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 171, CA (refd)
Lee Wah Bank Ltd v Ng Kim Lek & Ors [1979] 1 MLJ 21, FC (folld)
Lim Yee Teck & Ors v Shell Malaysia Trading Sdn Bhd [1985] 2 MLJ 265, PC
D (refd)
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL (refd)
Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171, CA (refd)
Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577, FC (refd)
E *Ng Kheng Yong @ Ng Tet Lai v Seng Hup Realty Co Sdn Bhd* [2004] 3 MLJ 477, CA (distd)
Nikmat Masyhur Sdn Bhd v Kerajaan Negeri Johor Darul Ta'zim [2014] 1 MLJcon 213; [2008] 9 CLJ 46, HC (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ
F 293, FC (refd)
Ramli bin Zakaria & Ors v Government of Malaysia [1982] 2 MLJ 257; [1983] 1 CLJ 73, FC (refd)
SamaWorld Asia Sdn Bhd & Anor v RHB Bank Berhad (dahulunya dikenali sebagai DCB Bank Berhad) [2008] MLJU 1089; [2008] 6 CLJ 44, CA (refd)
G *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 181, FC (refd)
Sime UEP Properties Bhd v Woon Nyoke Lin [2002] 3 CLJ 719, CA (refd)
Sinnathamby a/l Klondakoundan & Ors v Brijkishore a/l Shuparshad [1998] 1 MLJ 31; [1997] 4 CLJ 568, CA (refd)
H *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633, HC (refd)
Tara Rajaratnam v Datuk Jagindar Singh & Ors [1984] 1 MLJ 175 (refd)
Thian Oon Kin v Rekarya Consultant Group & Ors [2010] 8 MLJ 726, HC (refd)
I *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39; [1967] 1 LNS 197, FC (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)

Wallington v Townsend [1939] 2 All ER 225, Ch D (refd)
Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699, CA (folld)

Legislation referred to

Contracts Act 1950 ss 40, 57(1), (2), 74
Evidence Act 1950 ss 91, 92, 114(g)

Appeal from: Suit No JA-22NCVC-134–06 of 2016 (High Court, Johor Bahru)

Robert Lazar (Abdul Rashid Ismail, Lai Wai Fong and Siti Nurani Zahidi with him) (Rashid Zulkifli) in Civil Appeal No J-02(NCVC)(W)-329–02 of 2018 for the appellants
Cyrus Das (Kanasan Ghandinesen, K Thavanesan and N Malathi with him) (Gandhi) in Civil Appeal No J-02(NCVC)(W)-330–02 of 2018 for the appellant.
Robert Lazar (Abdul Rashid Ismail, Lai Wai Fong and Siti Nurani Zahidi with him) (Rashid Zulkifli) in Civil Appeal No J-02(NCVC)(W)-330–02 of 2018 for the respondents.
Cyrus Das (Kanasan Ghandinesen, K Thavanesan and N Malathi with him) (Gandhi) in Civil Appeal No J-02(NCVC)(W)-329–02 of 2018 for the respondents.

Nor Bee Ariffin JCA:

THE APPEALS

[1] After a full trial, the learned judicial commissioner ('JC') allowed the plaintiff's claim against the defendant for breach of a joint venture agreement and awarded general damages for loss of profits in the sum of RM25,107,560 with 5% interest per annum from the date of judgment until full settlement.

[2] Appeal No J-02(NCVC)(W)-329–02 of 2018 (Appeal No 329) is the appellant's appeal against the whole decision of the learned JC.

[3] Appeal No J-02(NCVC)(W)-330–02 of 2018 (Appeal No 330) is the respondent's appeal against part of the decision of the learned JC that allowed only one–half of the damages claimed by the plaintiff based on the alternative claim of damages.

[4] We heard the two appeals together. With regards to the Appeal No 329, we found no appealable error in the finding of facts and law by the learned JC

to warrant our appellate intervention. We unanimously affirmed the decision of the learned JC and dismissed the appeal with costs.

[5] As for Appeal No 330, we were unanimous in our finding that the learned JC fell into error when he deducted the award of RM50,215,120 by half. We set aside the decision of the learned JC and allowed the appeal by the plaintiff for loss of profits in the full sum of RM50,215,120 with costs.

[6] We now give reasons for the decision arrived at.

[7] For convenience, the parties are referred to as they were in the High Court.

THE BACKGROUND FACTS

[8] The plaintiff is a property developer.

[9] The defendant is a private limited company wholly owned by the Johor State Government ('the state government'). The defendant's Board of Directors ('BOD') is chaired by the Menteri Besar of Johor ('MB').

[10] By letters dated 17 March 1996 and 26 February 1997 from the Pentadbir Tanah Johor Bahru and Pejabat Tanah dan Galian, Johor (PTG's letters) respectively, the defendant was informed that the Majlis Mesyuarat Kerajaan Negeri Johor ('MMKN') had in its meeting on 22 January 1997, agreed to alienate to the defendant the lands PTB 17819, PTB 18145, Lot 20785 and Lot 20784. The defendant subsequently became the registered owner of those four pieces of land described as HS (D) 260235 PTB 18145, HS (D) 260234 PTB 17819, HS (D) 260233 Lot 20785, HS (D) 267780 PTB 20479.

[11] It is of some importance to note the following from the PTGs' letters. Firstly, the category of land use for the lands was building. Secondly, 'Kerajaan juga bersetuju Kumpulan Prasarana Rakyat Johor Sdn Bhd dikehendaki mengemukakan permohonan serahbalik dan kurniasemula sebelum membangunkan kawasan ini bagi tujuan Pembangunan Campuran'. Thirdly, 'syarat nyata akan ditentukan apabila permohonan serahbalik dan kurniasemula dipersetujukan'.

[12] The aforesaid essentially mean that as the alienation to the defendant was for building and there must be application for surrender and realienation, the lands were alienated to the defendant for development. The purpose of surrender and re-alienation was for the subdivision of the lands. As per the

PTG's letters, the defendant was required to apply for surrender and re-alienation of the lands prior to the development.

[13] On 2 August 1997, the defendant executed an agreement with Bitara Mawar Sdn Bhd ('Bitara') ('the development agreement') to develop the four aforesaid lands and Lot 19774 in respect of a proposed development project called Metro Larkin 1 ('the said project'). The said project was to be 100% commercial development. These four lands and Lot 19774 constituted the project land as particularised in Appendix A to the development agreement. It was not an issue that the defendant was not the registered owner of Lot 19774.

[14] On the same date, ie 2 August 1997, the plaintiff executed an assignment agreement with Bitara ('the assignment agreement') to take over all Bitara's rights, obligations and liabilities under the development agreement.

[15] The plaintiff said they were induced into executing the assignment agreement by the oral assurances given by the defendant's then Chief Executive Officer ('CEO'), one Dato' Amirullah AM Mayudin ('Dato Amirullah'). The plaintiff said the oral assurances formed a binding collateral agreement between the plaintiff and the defendant.

[16] It is appropriate to observe at this juncture that on 2 August 1997, two other agreements were also executed contemporaneously with the development agreement and the assignment agreement, namely the share sale and purchase agreement between the plaintiff and Abdul Halim bin Hj Mohamed ('PW4') and Mohd Salleh bin Othman ('Mohd Salleh') and the call option agreement between PW4 and Mohd Salleh and a company related to the plaintiff, Peracik Bumi Sdn Bhd ('Peracik'). These contractual transactions relate to the shareholding of Bitara. We shall advert to these contracts later in this judgment.

[17] Moving on with the said project, on 30 August 2000, the defendant made an application for surrender and re-alienation of the project land to the PTG.

[18] The defendant's application for surrender and re-alienation of the project land however was rejected by the Jawatankuasa Hasil Bumi at its meeting on 18 April 2001. The meeting was chaired by the MB. The rejection was made known to the defendant vide a letter from the PTG dated 23 May 2001.

[19] It was not in dispute that the reason for the rejection of the defendant's application for the surrender and re-alienation of the project land was on the

basis that the land zone usage for the project land was *gazetted* for recreation use as opposed to commercial use.

[20] The plaintiff and Bitara requested the defendant to appeal to the MB against the said decision because the reason for the rejection of the said application was wrong since the land zone usage for the project land for commercial development had already been approved by the Johor State Planning Committee ('SPC') on 12 February 2001, prior to the rejection.

[21] The defendant appealed not to the MB but to the PTG. The PTG in turn advised the defendant to appeal directly to the MB. The defendant did not heed to the PTG's advice.

[22] Whilst these were going on, unknown to the plaintiff or Bitara, the MMKN was said to have agreed in principle to transfer part of the project land to a third party on two occasions.

[23] The first was at the MMKN's meeting on 29 March 2000. The MMKN was said to have agreed in principle to transfer part of the project land to Johor Corp ('Johor Corp'). The plaintiff came to learn of the proposed intention only two years later by a letter dated 27 February 2002 from the defendant to Bitara.

[24] The second was at the MMKN's meeting on 12 December 2001. The letter from Unit Perancang Ekonomi Negeri Johor ('UPEN') to Johor Corp dated 29 January 2002 and copied to the defendant, showed it was agreed amongst others, that Johor Corp was to take over the defendant's debt of RM70m then owed to Perwira Affin Bank and as consideration thereof, the defendant's lands including part of the project land would be given to Johor Corp.

[25] Following the letter dated 29 January 2002 from UPEN to Johor Corp, on 6 January 2003, the defendant and Bitara entered into a supplemental agreement to replace the project land with Lukut Cina land in Kota Tinggi.

[26] The plaintiff questioned the authority of Bitara for making the supplemental agreement in view of the assignment agreement and asserted that the supplemental agreement had no legal effect. The defendant however contended that the supplemental agreement was validly executed.

[27] It was the plaintiff's pleaded case that the letter dated 27 February 2002 evinced the defendant's intention not to proceed with its obligations under the development agreement as they were awaiting instructions from the state government to transfer the project land to Johor Corp.

[28] The transfer of part of the project land to Johor Foods Sdn Bhd, a subsidiary of Johor Corp took effect on 30 August 2005. A

[29] The plaintiff said that the transfer to Johor Corp breached the development agreement as it effectively disabled and prevented any continuance of the development project encapsulated in the development agreement and the collateral agreement. B

[30] The plaintiff filed a suit against the defendant in Johor Bharu High Court in MT2–22–361 of 2007 ('first suit') seeking damages for breach of the development agreement and the collateral agreement. C

[31] The first suit was set for trial on 21 to 23 March 2011.

[32] The first suit however did not proceed. The reason being, in an attempt to settle the first suit, the plaintiff and the defendant entered into a deed of settlement dated 18 March 2012 (see Recital D) to replace the project land with two pieces of land belonging to the defendant held under PTD 1541 and Lot 35488 in Mukim Jelutong, Daerah Johor Bharu ('the Bukit Tempurung land'). D E

[33] The terms of the deed of settlement are summarised as follows:

(a) in cl 1, the defendant shall grant Bitara the sole and exclusive rights to develop the Bukit Tempurung land and Bitara shall simultaneously assign the said development rights to the plaintiff and the plaintiff shall withdraw the first suit with no costs but with liberty to file afresh; F

(b) in cl 2, the plaintiff shall carry out a feasibility study on the development of the Bukit Tempurung land within three months; G

(c) in cl 3, provisions were made on the outcome of the feasibility study in the event the plaintiff decides the development is feasible;

(d) in cl 4, provisions were made if the plaintiff decides that the development of the Bukit Tempurung land is not feasible; and H

(e) in cl 5, in consideration of the plaintiff executing the deed of settlement and withdrawing the first suit, the defendant undertakes not to raise limitation and/or laches as a defence against the filing afresh of the claim provided that the fresh claim was filed within 12 months from the date of the deed of settlement. I

[34] The plaintiff found the Bukit Tempurung land not viable for development. Apart from the land being on a low level, there were a lot of squatters occupying the land. Most of the squatters' houses were in very good

condition and the cost of infrastructure would be very high especially in terms of cost of filling up the earth on the land. Because of that and several land issues, no feasibility study commenced during the three months period. Parties agreed that in the event the feasibility study was not completed within three months, there would be an extension of time. In this instance, both parties mutually agreed to an extension of six months until 30 March 2012.

[35] The defendant accepted the plaintiff's decision that the Bukit Tempurung was not suitable for development.

[36] The defendant was unable to offer a substitute land for Bukit Tempurung land by 30 February 2012.

[37] The plaintiff said this entitled them to file afresh the first suit by virtue of cl 4 of the deed of settlement. The plaintiff then filed another Suit No 22 NCVC-95–03 of 2017 ('second suit').

[38] Before the second suit proceeded for trial, the defendant proposed a further settlement wherein the deed of settlement would continue to remain in force and that the defendant would look again for a suitable substitute land on the same terms as the deed of settlement.

[39] The second settlement between the parties was recorded in letters exchanged between the plaintiff's solicitors dated 18 October 2012 and the defendant's solicitors dated 19 October 2012.

[40] The salient terms of the second settlement were:

(a) the deed of settlement continued to remain in force subject to the following amendments:

(i) the Bukit Tempurung land was substituted with another land the details of which were to be confirmed by the defendant;

(ii) the time periods in cll 2, 3 and 4 commenced from the date suitable substitute land was identified and approved for alienation to the defendant;

(iii) the time period for cl 5 commenced from the date the suitable substitute land was identified and approved for alienation to the defendant or 30 June 2013;

(iv) the plaintiff was at liberty to file afresh the claim if the defendant was unable to provide a substitute land by 30 June 2013.

(b) all other terms of the deed of settlement remained the same and were valid; and

(c) the plaintiff shall withdraw the second suit but with liberty to file afresh. A

[41] The plaintiff thereafter withdrew the second suit.

[42] The deed of settlement was extended for six months at the request of the defendant as the matter on the substituted land was still being attended to by UPEN. B

[43] However, the defendant did not manage to procure a suitable substitute land even after several extensions of time were granted spanning from 30 June 2013 until 30 June 2016. C

[44] The plaintiff re-filed the claim on 28 June 2016 ('the present suit').

THE PRESENT SUIT D

[45] The material express terms of the development agreement are set out in para 6(a) to (p) of the statement of claim ('SOC'). In gist they are as follows:

(a) the defendant grant Bitara as the developer the sole and exclusive rights to develop the project land (section 2.1); E

(b) the developer shall be responsible for the entire cost of the said project as set out in para 1(b) of Appendix D (section 2.2(b));

(c) the developer covenants and undertakes to be responsible for the provision of technical knowledge, skills, expertise, consultancy and such other services and works incumbent on the developer to provide relating to the said project (section 3.1(a)(i)); F

(d) the defendant covenants and undertakes to use its best endeavour to assist and support the developer in applying for the approvals, licenses, consents and permits from the relevant authorities pertaining to the said project provided that such assistances or supports shall not be construed in any manner whatsoever as a guarantee or assurance that the same shall be granted or obtained (section 3.2(b)(i)); G H

(e) the developer shall pay the defendant the project consideration as set out in Appendix C (section 4.1);

(f) the developer shall furnish the defendant a bank guarantee to guarantee the Project Consideration (Appendix C); and I

(g) the developer shall be responsible for the submission of the application to the relevant authorities for subdivision and conversion of the project land and to procure the approval thereof (section 5.2).

[46] The defendant in para 6 of the statement of defence ('SOD') admitted that those were the summary of part of the terms of the development agreement.

[47] The plaintiff said that the development agreement also had implied terms. These implied terms were necessary to give the development transaction such business efficacy to ensure that the development agreement could be carried out.

[48] The implied terms were set out in para 7(a)–(d) of the SOC, namely the defendant shall apply for, and procure, the surrender and realienation of the project land prior to the development (paras (a)–(b)). Alternatively, the defendant shall take all positive and/ or reasonable steps to procure the surrender and re-alienation of the project land prior to the development (para (c). The defendant warrants that it has an unequivocal right to develop the project land and there would be no objections from the state government pertaining to the development project (para (d)).

[49] The implied terms were not substantially in issue. The defendant in para 7 of the SOD admitted to the implied terms except for para (d) where it was pleaded '... pada setiap masa yang material, adalah tidak munasabah untuk Defendan memberi sebarang jaminan bahawa Kerajaan Negeri tidak akan membantah berkenaan Projek tersebut'.

[50] On the inducement to execute the assignment agreement by the oral assurances given by the defendant, the plaintiff said that sometime in mid 1997 Dato Amirullah orally assured the plaintiff's director Dato' Francis Lim Keow Lam ('PW5') that the defendant had an unequivocal right to develop the project land and that there would be no objection from the state government pertaining to the said project and that the state government would provide the surrender and re-alienation of the project land to facilitate their development. To support these oral assurances, Dato' Amirullah produced the PTG's letters.

[51] The plaintiff claimed that the defendant had breached the development agreement and their oral assurances/the collateral agreement made to the plaintiff in the following instances:

(a) the defendant in refusing to appeal to MB, had failed to take all reasonable steps to procure the surrender and re-alienation of the project land; and

(b) the defendant in transferring the project land to Johor Corp, had thereby disabled and prevented the continuance of the development of the said project.

[52] The plaintiff sought damages for loss of profits and special damages. A

[53] The gist of the defendant's defences were as follows. The plaintiff had no locus to sue. The plaintiff was not privy to the development agreement. If there be any breaches, Bitara was the right party to sue, not the plaintiff. B

[54] As the plaintiff was appointed by Bitara pursuant to cl 10.2 of the development agreement to be their turnkey contractor and to finance the said project for them, the plaintiff had no basis to claim that they had replaced Bitara as a party to the development agreement. C

[55] Even if the plaintiff had the locus, there was no breach of the development agreement as the contract has been frustrated by the decision made by the MMKN to transfer the project land to Johor Corp and the defendant were bound to comply with the decision to surrender the project land back to the state authority. In the alternative, even if there be breaches, the plaintiff had relinquished all its rights pursuant to the supplemental agreement. D

[56] The collateral agreement was not binding on the defendant. Any inducement, if any, which was denied, given by Dato Amirullah, was given in his personal capacity without the knowledge of and authorisation from defendant. E

[57] The defendant were not a party to the assignment agreement, thus the said agreement did not bind them and neither did they owe the plaintiff any obligations thereunder. F

[58] The defendant admitted to the execution of the deed of settlement but the proposed substitution of the land had nothing to do with the development agreement that was frustrated. G

[59] The defendant also pleaded the defence of limitation and laches.

[60] The defendant contended that Lot 19447 could not be part of the project land as the defendant was not the registered owner. The plaintiff however claimed that defendant would not have included Lot 19774 to be part of the project land unless they had a beneficial interest or right to this lot. H

AT THE HIGH COURT I

[61] We summarised the learned JC's decision as follows.

A **[62]** On the issue of whether Lot 19774 formed part of the project land as stated and defined in the development agreement, the learned JC came to the finding that Lot 19774 was intended to be part of the development notwithstanding that Lot 19774 was not registered in the name of the defendant.

B

[63] There was in existence a collateral agreement between the plaintiff and the defendant. The learned JC accepted PW5's testimonies that Dato Amirullah had given him the oral assurances. The learned JC invoked the adverse inference under s 114(g) of the Evidence Act 1950 against the C defendant for their failure to call Dato Amirullah to testify.

[64] The assignment agreement was intended to be a complete assignment and not merely an appointment of the plaintiff as a turnkey contractor. Thus, D the plaintiff had the locus standi to sue the defendant under the development agreement.

[65] It was no longer a live issue as to which party should bear the responsibility to apply for the surrender and re-alienation of the project land E since the defendant had submitted the said application. As the reason for the rejection of the said application was wrong, His Lordship observed that the defendant had made hard work of writing a letter of appeal to the MB who happened to be their own chairman, to clarify the matter.

F

[66] The defendant was not fully committed to the development agreement with the plaintiff and was keeping all their options open. The decision of the MMKN on 2 December 2001 which stated that Johor Corp would settle the defendant's debt of RM70m owed to Perwira Habib Bank as consideration for G the transfer of the project land was definitely a better deal for the defendant compared to the RM34m Project Consideration the defendant would expect under the development agreement. There was therefore no possibility of the development agreement proceeding, creating a situation for the application of s 40 of the Contracts Act 1950 on the effect of refusal of a party to perform H their promise wholly.

[67] On the defendant's case of frustration, the facts of the case did not support the existence of some supervening event.

I **[68]** As regards the deed of settlement, the learned JC was of the view that the attempts at settlement were in support of some liability being acknowledged by the defendant.

[69] The learned JC concluded that the plaintiff had successfully proven their claim and that they were entitled to damages. The learned JC said the defendant had done little to rebut or challenge the quantum of damages claimed by the plaintiff.

[70] As regards the quantum, the learned JC opined that the plaintiff had proven their loss of profits based on: (a) the evidence of PW5 on the proposed development which was RM51,263,010; and (b) the alternative sum of RM50,215,120 based on the evidence of the quantity surveyor ('PW2').

[71] Notwithstanding his findings, the learned JC said that the amount of damages to be awarded would still be subject to the discretion and assessment of the court. In exercising his discretion and in making his assessment, among others, the learned JC took judicial notice that there was the high possibility of slow sales due to a glut or oversupply in the Johor Bharu property market. Premised as such, the learned JC allowed only one half of the damages claimed by the plaintiff based on the lower/alternative claim of damages of RM50,215,120, ie the sum of RM25,107,560 with interest thereon at 5%pa from the date of judgment until full settlement. The learned JC dismissed the claim for special damages of RM35,570.40.

GROUNDS OF APPEAL FOR APPEAL NO 329

[72] The defendant set forth 12 grounds of appeal, summarised as follows.

Grounds 1, 2 and 3

[73] These grounds relate to the deed of settlement and the supplemental agreement. The defendant contended that the deed of settlement was intended as a conclusive settlement between the plaintiff and the defendant and as such, the rights arising from the development agreement read with the supplemental agreement were subsumed in the deed of settlement. The learned JC ought to have held that the plaintiff's cause of action against the defendant, was governed by the deed of settlement and nothing else.

[74] Pursuant to the deed of settlement, the project land had been replaced by other lands and the plaintiff had unreasonably refused to execute the development agreement and supplemental agreement for the purpose of the replacement land, resulting in the deed of settlement expiring by effluxion of time.

Ground 4

[75] This relates to the defence of limitation and/or laches against the plaintiff's claim. Clause 5 of the deed of settlement stipulated that fresh claim was to be filed within 12 months from 18 March 2011. The learned JC ought to have held that the plaintiff's claim in the present suit filed on 28 June 2016 was time-barred by limitation.

Grounds 5, 6 and 7

[76] These grounds relate to the defendant's defence of frustration of the development agreement.

Ground 8

[77] This ground relates to the supplemental agreement. The defendant said the development agreement must be read with the supplemental agreement. The learned JC ought to have held that the project land was in any event no longer earmarked and intended for the said project as it had been replaced by the Lukut Cina land.

Ground 9

[78] This ground relates to the issue on the plaintiff's locus to sue. The plaintiff had no locus standi to sue the defendant under the development agreement and/or the supplemental agreement, when the plaintiff was not privy to both.

Ground 10

[79] The learned JC erred by allowing the plaintiff's claim against the defendant for breach of the development agreement and/or the collateral agreement.

Grounds 11 and 12

[80] These grounds relate to the award of damages made against the defendant for breach of the development agreement and/or collateral agreement.

[81] At the hearing of these appeals, the issues taken up by the defendant were much narrower. Only the following issues were raised in the submission as to why the decision of the learned JC was assailed:

(a) the learned JC erred when he found that it was the defendant's responsibility to ensure the surrender and re-alienation of the project land solely on the basis of the oral assurance given by Dato Amirullah

and consequently the failure by the defendant to secure the same amounted to a breach of the development agreement;

(b) the learned JC wrongly held that the deed of settlement and the subsequent attempts made by the defendant in finding a replacement land to the original project land was an acknowledgement of liability on the part of the defendant of the purported breach of the development agreement;

(c) the learned JC wrongly held that the transfer of the project land to Johor Corp does not qualify as supervening event on the basis that the transfer was 'a matter of choice for the decision or executive decision' which involved the MB who was also the chairman of the defendant; and

(d) the learned JC had erred in finding that the plaintiff was entitled to the damages awarded.

[82] From the above, it is pertinent to note the following. The defendant had not pursued their objections on the learned JC's decision as to Lot 19774 being part of the project land and the validity and legal effect of the assignment agreement. The defendant also appeared to have dropped grounds 1, 2, 3, 4, 8 and 9. We shall thus proceed to consider what was submitted before us which essentially relate to the remaining grounds of appeal.

OUR DECISION

[83] We first address the issue of liability in Appeal No 329.

[84] The starting point is the joint venture. PW5 gave evidence that sometime in August 1996, Dato Amirullah invited him to prepare a preliminary proposal for the development of the project land on a joint venture basis with the defendant. Dato Amirullah was alleged to be instrumental over the mapping of the joint venture which would be carried out as follows:

(a) the joint venture would include the defendant, the plaintiff and Bitara;

(b) Bitara was included as the defendant held 60% of shares in Bitara. The other 40% was held by Kemudi Jasa Sdn Bhd ('Kemudi');

(c) the defendant was to enter into a development agreement with Bitara to develop the project land;

(d) Bitara at the same time was to enter into an assignment agreement with the plaintiff to carry out the development as a turnkey contractor as well as to provide the relevant guarantees under the development agreement;

(e) the plaintiff would purchase the shares in Kemudi, thus holding 40% shares in Bitara. The plaintiff and the defendant would have directors in the Board of Director of Bitara. The other directors were PW4 and Mohd Salleh;

(f) as consideration for the plaintiff's 40% shares in Kemudi, PW4 and Mohd Salleh would be given 20,000 shares in the plaintiff company; and

(g) PW4 and Mohd Salleh would then enter into a call option agreement with Peracik whereby the two directors would be paid RM2m as deposit to sell back the 20,000 shares in the plaintiff's company. The shares were valued at RM8m.

[85] There was no challenge to the credibility of PW5's evidence that Dato Amirullah had mapped out all the arrangements and that these four agreements were all executed simultaneously and at the same place. We should not be putting too much weight on why the joint venture took such a course. According to PW5 and PW4, they had all consented to it.

[86] It was amply clear that the joint venture said to have been mapped out by Dato Amirullah, was effectively carried out with the back to back execution of the development agreement, the assignment agreement, the share sale and purchase agreement and the call option agreement.

[87] Even with the abovementioned transactions taking place, it is still incumbent on the plaintiff to prove on the balance of probabilities the existence and the terms of the collateral agreement. In *Sama World Asia Sdn Bhd & Anor v RHB Bank Berhad (dahulunya dikenali sebagai DCB Bank Berhad)* [2008] MLJU 1089; [2008] 6 CLJ 44, the Court of Appeal held that whether there was a collateral contact is a finding of fact by the trial judge and the collateral contract must be proved strictly.

[88] We take the view that as the defendant had not pursued the learned JC's finding on the validity and the legal effect of the assignment agreement, by the same token, the defendant is taken to have accepted the plaintiff's evidence on the existence of the oral assurances given by Dato Amirullah as a background reason for the plaintiff executing the assignment agreement.

[89] Be that as it may, the learned JC was correct in his findings of fact that Dato Amirullah' had made the oral assurances for several reasons. At the material time, there was no reason to doubt the said oral assurances as Dato Amirullah was the CEO of the defendant. The defendant was and is wholly owned by the state government with the MB sitting as the chairman of the defendant's BOD and there was the PTG's letters produced by Dato'

Amirullah. The learned JC had accepted the direct evidence of PW5 on the oral assurances which remained unrebutted. Evidence was also led to show that the plaintiff then took over the obligations and liabilities of Bitara under the development agreement by virtue of the assignment agreement, the plaintiff were given Kemudi's shares in Bitara and the shares in the plaintiff were given to PW4 and Mohd Salleh. Perachik had paid the RM2m to PW4 and Mohd Salleh as deposit to buy back the plaintiff's shares.

[90] In our view, His Lordship had given sufficient judicial appreciation by evaluating the evidence and demeanour of the defendant's witnesses. The learned JC found that the defendant's witnesses had no personal knowledge of the dealings by Dato Amirullah. The Federal Court in *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785 held that the finding on a witness's credibility is a personal opinion of a trial judge who had the advantage of the performance of the witnesses and it should not be ordinarily disturbed.

[91] The defendant could have rebutted PW5's evidence by calling Dato Amirullah. There are three compelling reasons to call Dato Amirullah, in the face of PW5's evidence. First, Dato Amirullah did not give the assurances in his personal capacity but in his capacity as the CEO of the defendant as so found by the learned JC. Second, Dato Amirullah would be in the best position to unfold the narratives of the whole transaction as between the parties. Third, his evidence was very crucial to show how far was the involvement of the MB and/or the state government in relation to the allegation by the plaintiff that the state government shall provide the surrender and re-alienation of the project land prior to development. It is accepted that the procedure on the surrender and re-alienation was an important and integral step in the development of the said project and that unless the MMKN approved the surrender and re-alienation of the project land, the said project could not be proceeded with. In the circumstances, Dato Amirullah was not just a witness to satisfy or quench the curiosity of a party (*Krishnan Nambiar s/o Perabakaran & Ors v Dr P Mahendran & Anor* [2009] 4 MLJ 267). But it was quite clear from the start that the defendant had no intention at all to call him.

[92] It is well settled law that an appellate court would be slow to disturb a trial court finding of facts unless the decision is shown to be plainly wrong (*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453). The learned JC in our view had

correctly invoked the adverse inference under s 114(g) of the Evidence Act 1950 that the evidence by Dato Amirullah, if tendered, would be adverse or unfavourable against the defendant (*Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1). To refrain calling a material and important witness who was available and could be contacted, tantamount to a suppression of material and important evidence.

[93] There is another matter to highlight. Before us, learned counsel for the defendant submitted that the plea on collateral agreement at para 16 of the SOC was a repeat of the implied terms at para 7 of the SOC. We had alluded to para 7 of the SOC at paras 47–48 of this judgment. As the defendant had admitted to the implied terms in para 7 of their SOD (with the exception of para (d)), and equated them with the oral assurances, there is nothing much to dispute on the oral assurances or the collateral agreement. Paragraph 7 of the SOD merits reproduction:

> 7. Kecuali perenggan 7(d), perenggan 7 Pernyataan Tuntutan adalah diakui. Defendan menegaskan bahawa pada setiap masa yang material kesemua pihak termasuk Plaintif mengetahui bahawa Defendan sebagai pemilik-pemilik benefisial telah diwajibkan untuk menyerah balik Tanah Projek tersebut untuk dikurniabalik semula sebelum pembangunan Tanah Projek dan Defendan akan mengambil kesemua langkah-langkah yang perlu untuk mendapatkan kelulusan dari Kerajaan Negeri. Defendan menegaskan bahawa pada setiap masa yang material, adalah tidak munasabah untuk Defendan memberikan sebarang jaminan bahawa Kerajaan Negeri tidak akan membantah berkenaan Projek tersebut.

[94] At the risk of repetition, from the above para 7 with cross reference made to para 7 of the SOC, the following were admitted to by the defendant:

(a) the defendant shall apply for the surrender and re-alienation of the project land prior to the development;

(b) the defendant shall procure the surrender and re-alienation of the project land prior to the development; and

(c) alternatively, the defendant shall take all positive and/or reasonable steps to procure the surrender and re-alienation of the project land prior to the development.

[95] Further to that, para 7 also stated '... pada setiap masa yang material kesemua pihak termasuk Plaintif mengetahui bahawa Defendan sebagai pemilik-pemilik benefisial telah diwajibkan untuk menyerah balik Tanah Projek tersebut untuk dikurniabalik semula sebelum pembangunan Tanah Projek ...'. The admission here is that the defendant as the beneficial owner of the project land, carried the responsibility to make the application for the surrender and re-alienation of the project land.

[96] Having made their admissions, the defendant must stand or fall by their pleaded case. In *Thian Oon Kin v Rekarya Consultant Group & Ors* [2010] 8 MLJ 726, Harminder Singh JC (as he then was) observed:

> [16] On the issue of pleadings, the decision in *Chong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357 is instructive. Speaking for the Court of Appeal, Gopal Sri Ram JCA (as he then was) held:
>
> > Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty — whether in contract or tort-may properly deny liability and require the plaintiff to prove his or her claim. But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct.

[97] By their judicial admissions, the defendant's legal arguments that the learned JC ought to have rejected the oral assurances on the basis that the same contravened the principles of parol evidence as provided under ss 91–92 of the Evidence Act 1950, and there was an absence of a consideration, are unsustainable.

[98] Our attention was drawn by learned counsel for the defendant to section 5.2 of the development agreement and it reads:

> The Developer shall be responsible for the submission of the application to the Relevant Authorities for subdivision and conversion of the Project Land and to procure the approval thereof including the issuance of the subdivided title and/or issue document of title and/or strata title of the same and to the relevant premises as per the Project Plans as the case may be.

[99] We agree that section 5.2 envisages the plaintiff to make the application for surrender and re-alienation. However, the condition placed by the MMKN vide PTG's letters showed that the MMKN had specifically required the defendant to make such application. The PTG's letters and para 7 of the SOD actually had put to rest the issue as to who was responsible to make the application for the surrender and re-alienation of the project land. In the face of the direction of the MMKN, no other party could make the application other than the defendant.

[100] The application for the surrender and re-alienation by the defendant on 30 August 2000 was obviously made in compliance with the MMKN's direction as per the PTG's letters and also pursuant to the implied terms and the oral assurance. The application was not made pursuant to section 5.2 where section 3.2(1)(a) of the development agreement would be applicable.

[101] Section 3.2(1)(a) deals with the defendant's covenants and

undertakings and it reads:

> (1) KPRJ hereby covenants undertakes warrants and represents to the Developer that so long as the Developer is not in breach of any provision of this Agreement —
>
> (a) it shall use its best endeavour to assist and support the Developer in applying for the approvals, licences, consents and permits from the Relevant Authorities pertaining to the Project PROVIDED ALWAYS such assistance or supports shall not be construed in any manner whatsoever as a guarantee or assurance that the same shall be granted or obtained:

[102] The language in section 3.2(1) is plain and unambiguous. The applications stipulated therein was to be made by the developer which is the plaintiff, not by the defendant. As the application for the surrender and realienation of the project land was made by the defendant, section 3.2(1)(a) has no relevance to the said application. Hence, it is misconceived to suggest that the defendant could invoke section 3.2(1)(a) so as to curtail the extent of the defendant's duty with regard to the said application.

[103] The collateral agreement thus made up the whole contract between the parties so as to enable the defendant to proceed with the submission of the application for the surrender and re-alienation. Oral evidence is thus admissible to prove the collateral agreement. We find support for this view in *Lee Wah Bank Ltd v Ng Kim Lek & Ors* [1979] 1 MLJ 21, where Chang Min Tat FCJ said at p 22:

> Section 92, of course, applies where upon the face of it, the written instrument appears to contain the whole of the terms of the contract. But where it appears that it does not contain the whole agreement between the parties and that there were certain other oral conditions which are not inconsistent with the written instrument and which would make up the whole contract, oral evidence is admissible to prove those other conditions.

[104] It follows therefore that the absence of consideration is a non-issue.

[105] We also found no merit in the defendant's argument that the oral assurances were incredulous because the defendant could not speak for the state government and to give assurances of such nature. The defendant had only themselves to blame when they made the choice not to call Dato Amirullah to rebut the plaintiff's case on the said oral assurances for the learned JC to consider.

[106] Following the submission of the said application, the defendant must by the implied terms and the oral assurances that they had committed themselves to, procure the surrender and re-alienation of the project land.

[107] The defendant's response was that even if it was their duty to make the application for surrender and re-alienation of the project land, the duty was simply to take reasonable steps to make or submit the intended application, which they had done, but whether or not the application or approval was granted was not within the defendant's purview or control. The rejection of the said application by the PTG was through no fault of theirs.

[108] To appreciate the issue at hand, we set out below the events that had transpired in chronological sequence.

[109] The plaintiff's claim that the reason for the rejection was wholly wrong, was obviously not without basis. Prior to the rejection of the application on 18 April 2001 and the PTG's letter dated 23 May 2001 making known the rejection to the defendant, the SPC in its meeting chaired by the MB on 12 February 2001 made the following decision:

> Bersetuju meluluskan permohonan perubahan zon gunatanah daripada rekreasi kepada perdagangan dengan syarat tapak berkenaan dirancangkan bersama-sama dengan tapak Stadium Larkin dan rizab Kementerian Belia dan Sukan 9 Tepian Gelanggang) serta mengadakan 10% kawasan lapang yang dikelompokkan di tengah-tengah tapak pembangunan. (see Kertas Makluman at p 385).

[110] The zoning for commercial development was approved. The decision was contained in the *Kertas Makluman* from Jabatan Perancang Bandar Dan Desa Negeri Johor to UPEN dated 12 March 2001. The *Kertas Makluman* was copied to the defendant. The defendant thus have knowledge of the decision of the SPC as early as 12 March 2001.

[111] After the decision of the SPC, the defendant wrote to UPEN by a letter dated 9 May 2001, informing UPEN that the project land was subject to the development agreement with Bitara. The reason for the letter is obvious. It served as a reminder to UPEN that the project land, which was now being approved for commercial usage, and in view of the MMKN's decision in principle on 29 March 2000, was contractually committed to the plaintiff.

[112] On 14 June 2001, the defendant informed Bitara of the rejection of the application for surrender and re-alienation.

[113] Following the rejection, the defendant was requested to appeal to the MB over the rejection:

(a) on 23 June 2001, by the plaintiff through Bitara as zoning had been approved by the SPC;

(b) in a facsimile dated 3 July 2001, PW5 sent a note to Dato Amirullah informing him that the approval to change the project land zone usage

from recreation to commercial on 12 February 2001 did not seem to be within the knowledge of the Jawatankuasa Hasil Bumi when the application for surrender and re-alienation was considered as the PTG had submitted the file ahead of the SPC meeting. This resulted in SPC's approval on zoning to change the land zone usage of the project land from recreation to commercial on 12 February 2001 not included in the file when it was tabled at the MMKN meeting. PW5 requested the defendant to appeal directly to MB to review the application; and

(c) on 9 July 2001, the plaintiff again issued a letter requesting the defendant to appeal to the CM for approval of the application on the basis that zoning had been approved.

[114] There was no response from the defendant to all these requests to appeal.

[115] However, on 13 July 2001 the defendant made an appeal the PTG premised on the same reason, that is, the zoning to commercial usage had been approved by the SPC.

[116] On 27 August 2001, the PTG informed the defendant that the defendant had to appeal to the MB.

[117] The defendant still did not appeal to the MB.

[118] Thus far, despite the plaintiff's three letters and the PTG's letter, all requesting the defendant to appeal to the MB on the incorrect rejection of the application for surrender and re-alienation of the project land, the defendant still refused to do so. No reason was given as to why the defendant did not wish to appeal to the MB.

[119] On 27 July 2001, the plaintiff informed the defendant that UPEN said the application could not be approved until the defendant met with Johor Corp to decide on the status of the project land. UPEN required the defendant's written confirmation on the matter so that they could advise the PTG and Majlis Bandaraya Johor Bahru accordingly.

[120] The defendant failed to give written confirmation or to meet Johor Corp.

[121] Instead, what the defendant did was enclosing their letter to UPEN dated 9 May 2001 via facsimile dated 29 August 2001 to the plaintiff, that the project land was involved in the development agreement. The plaintiff

contended that by sending this letter, the defendant were actually re-assuring them that their proposed development was intact.

[122] Then on 12 December 2001, the MMKN made a decision in principle that Johor Corp was to take over the defendant's debt of RM70m then owed to Perwira Affin Bank and as consideration for settling this debt, properties belonging the defendant, including part of the project land, would be awarded to Johor Corp. The relevant excerpt is reproduced below:

> 2.3 Majlis seterusnya bersetuju secara dasar PJ mengambilalih hutang KPRJ yang dibuat dengan Perwira Affin Bank berjumlah RM70 juta dengan memasukkan pinjaman tersebut di dalam Pelan Induk Penstrukturan Semula Korporat (CRMP) PJ.
>
> 2.4 Majlis selanjutnya bersetuju secara dasar Kerajaan Negeri mengurniakan tanah-tanah milik KPRJ sebagaimana jadual di bawah kepada PJ sebagai balasan kerana PJ menyelesaikan hutang KPRJ.

[123] Following the decision of the MMKN on 12 December 2001, vide a letter dated 27 February 2002, the defendant informed the plaintiff that they had been instructed by the state government that the project land was to be developed by Johor Corp (p 414). The letter reads:

> Untuk pengetahuan pihak tuan, KPRJ telah dimaklumkan bahawa pihak Kerajaan Negeri melalui Majlis Mesyuarat Kerajaan dalam mesyuaratnya pada 29.3.2000 telah bersetuju pada dasarnya ke atas cadangan Perbadanan Johor untuk membina sebuah Bandar Sukan di Ulu Tiram, Johor. Seterusnya, Kerajaan juga bersetuju supaya tapak Stadium Larkin dan kawasan sekitarnya termasuk tanah-tanah Metro Larkin 1 diserahkan kepada Perbadanan Johor untuk dibangunkan.
>
> Sehubungan dengan itu, cadangan pembangunan Metro Larkin 1 oleh pihak tuan berkemungkinan besar tidak dapat diteruskan. Pada masa ini, KPRJ sedang menunggu arahan dariapad Kerajaan untuk menyerahkan semula tanah berkenaan supaya dapat dikurniakan kepada Perbadanan Johor.

[124] On 9 September 2003, the plaintiff issued a letter directly to the MB explaining the background of the development agreement and the steps taken thus far towards the development project. The plaintiff appealed to the MB to retain the project land with the defendant so that the proposed developments could proceed. There was no response received from the MB.

[125] Thereafter, on 30 September 2003, the plaintiff's solicitors issued a letter of demand that the defendant prevent any transfer of the said lands to Johor Corp and for the defendant take the necessary positive steps to appeal on the application for surrender and re-alienation of the project land. The defendant again did not respond to the plaintiff's solicitors letter.

[126] Instead, on 9 October 2003 and 5 November 2003, the defendant issued letters to the PTG to reconsider the application for surrender and re-alienation and to extend the appeal to the state government, notwithstanding the PTG earlier letter requesting the defendant to appeal directly to the MB.

[127] By a letter dated 11 November 2003, the defendant informed the plaintiff's solicitors the appeal they had made on 5 November 2003 and enclosed a copy thereof.

[128] On 14 November 2003 and 10 February 2004, the plaintiff's solicitors issued further letters to the defendant seeking their feedback on the steps taken to cause the state government to retract its decision to transfer the project land to Johor Corp. There was again no response from the defendant.

[129] From the events unfolded above, the pivotal issue here is whether the defendant was bound to appeal and whether they had done all that could reasonably be expected of them under the circumstances?

[130] It was submitted for the defendant that in law, it is sufficient for a party whose duty is to obtain approval of a relevant authority to take the necessary or reasonable steps to submit the application. They are not bound to appeal against the rejection because appeal is not to be included under reasonable steps required in respect of the defendant's duty to apply for the surrender and realienation of the project land. Our attention was directed to the Federal Court case of *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 181, *Lim Yee Teck & Ors v Shell Malaysia Trading Sdn Bhd* [1985] 2 MLJ 265 (the Privy Council affirmed the decision of the Federal Court); *Sinnathamby a/l Klondakoundan & Ors v Brijkishore a/l Shuparshad* [1998] 1 MLJ 31; [1997] 4 CLJ 568.

[131] Learned counsel for the defendant submitted before us that any appeal by the defendant in this instance is purely an administrative appeal.

[132] It was further submitted that the defendant had never terminated the development agreement despite the rejection of the defendant's application for the surrender and re-alienation of the project land. Quite apart from making the application and appealing against the rejection, the defendant had, in good faith, continued to find suitable substituted lands for the plaintiff as a replacement for the project land vide the supplemental agreement.

[133] We do not agree with learned counsel's argument that the appeal was purely administrative. The defendant was bound by the implied terms and the oral assurances they had agreed to. And, if it was purely administrative, why did

the defendant give the plaintiff the letter they sent to UPEN dated 9 May 2001 on 28 September 2001? Why did the defendant take it upon themselves to submit three appeals to the PTG, the last on 5 November 2003 and informing the plaintiff that they had made the appeal?

[134] It was not disputed that the reason for the rejection of the defendant's application for the surrender and re-alienation of the project land was based on an incorrect assumption that the project land was still *gazetted* for recreation when in actual fact the zoning was already approved for commercial on 12 February 2001 before the meeting of the Jawatankuasa Hasil Bumi on 18 April 2001.

[135] It was also not disputed that there was no protocol or mechanism on how one was to go about appealing against the decision of the MMKN. There is no statutory provisions to cater for such situation. The defendant never at any time responded to the plaintiff to say that it was the protocol to appeal to the PTG and not to the MB. It follows that DW1's evidence in his Witness Statement that '... saluran yang betul dan protokolnya berhubung dengan rayuan ke atas keputusan EXCO Negeri adalah di Pejabat Tanah dan Galian Johor dan bukan terus kepada Menteri Besar seperti yang dilakukan oleh Defendan' was therefore unsubstantiated. The protocol was not before the court.

[136] Significantly, when the PTG had advised the defendant to make the appeal to the MB, the PTG was showing the defendant the proper procedure to make the appeal for the rejection of the application to surrender and re-alienation of the project land. The clear message from the PTG was that for the said application, the appeal was to be made direct to the MB.

[137] Premised on the PTG's advice, we think there was every reason to appeal to the MB. The defendant's inexplicable reluctance to appeal to the MB till the end and the insistence on appealing to the PTG when inevitably it would be an exercise in futility as was so proven when PTG did not respond to the defendant's letters dated 9 October 2003 and 5 November 2003, is baffling. While it cannot be denied that firstly, the MB who was and is the chairman of the defendant, always acts on the advice of the MMKN in making any decisions which means the MB does not have the sole authority to decide on the defendant's application and secondly, that the MMKN's decision to transfer the project land was outside the purview of the defendant and the defendant cannot be faulted for that, but the defendant seemed to have missed a very crucial point. That point is, the request to appeal to the MB was not for him to decide the matter on his own to its final conclusion.

[138] PW5 gave unrebutted evidence as to why the appeal should be made to the MB. This was because from his experience as a property developer for 35 years, only the MB has the power to call back for the file and for the said application to be presented again before the MMKN for a re-consideration.

[139] The defendant knew well that the rejection of the said application was solely due to an incorrect assumption over the zoning of the project land. There was no other reason to show the basis of the rejection other than that incorrect assumption. Since the MB sat in both the meetings of the Jawatankuasa Hasil Bumi and the SPC, it was only reasonable to assume that the matter needed to be re-considered by the MMKN. It would be up to the MMKN then to re-consider and/or correct the previous position they had taken. The defendant was thus under a contractual bligation to get the matter re-considered.

[140] The appeal to MB aside, there were other action that could have been undertaken by the defendant to procure the surrender and re-alienation of the project land, ie, to discuss with Johor Corp as suggested by UPEN.

[141] The defendant did not give the written confirmation sought from them for reasons known only to them.

[142] In both situations, the plaintiff, the PTG and UPEN had pointed out certain steps which the defendant could have taken to procure the approval of the application to surrender and re-alienation of the project land. The burden thus ordinarily shifts to the defendant to show that they had took those steps, or that those steps were not reasonably required, or that those step would have been bound to fail (see *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905).

[143] In our view, the positive and reasonable steps the defendant should have taken to procure the surrender and re-alienation of the project land, was to appeal to the MB or to meet up with Johor Corp as suggested by UPEN. By refusing to do one or the other, the defendant cannot claim that they had fulfilled the duty and obligation required of them.

[144] We shall now touch briefly on the supplemental agreement in the context mentioned by the learned counsel for the defendant that the defendant had in good faith maintained the spirit of the development agreement through the supplemental agreement by continuously looking for a replacement land for the project land to suit the plaintiff's needs. We reiterate that the defendant did not pursue ground 8 in the hearing of this appeal.

[145] We had perused the evidence adduced, including the documentary evidence relating to the execution of the supplemental agreement. We opined

that the learned JC did not err when he said that PW5 had no knowledge of the supplemental agreement. PW4 who was a signatory to the supplementary agreement gave evidence that he did not obtain consent from the plaintiff to substitute the project land with Lukut Cina land before signing the supplemental agreement. Neither did he informed the plaintiff about it. He said that he was instructed by the defendant to sign it but in the same breathe, he said it was necessary to get the agreement of the plaintiff because the plaintiff was the one who would be carrying out the project. Then, there were various subsequent letters and events which clearly confirm that the defendant themselves had taken the position that the supplemental agreement was not valid. The reliance on a resolution executed by the directors of Bitara and PW5 in his capacity as director of Bitara dated 20 December 2002 was flawed. The said resolution does not relate to any agreement to substitute the project land with the Lukut Cina land.

[146] In the circumstances, we agreed with the plaintiff that the supplemental agreement was not valid. The defendant cannot rely on the supplemental agreement which was unenforceable, to demonstrate their strong commitment to the development agreement.

[147] We concede with the learned JC that by transferring the project land to Johor Corp on 30 August 2005, there was no possibility for the development agreement proceeding as the defendant had by such act of transferring, disabled themselves from performing their obligations under the development agreement. The transfer had caused the said project to fail. In law, this case falls under s 40 of the Contracts Act 1950 (*Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697). The learned JC had rightly said that the breach was caused by the defendant as a matter of choice.

[148] Neither did the learned JC err when he held that the deed of settlement was an acknowledgement of a liability on the part of the defendant. We say so for the following reasons.

[149] We agreed with the submission of learned counsel for the plaintiff that the deed of settlement has to be construed on its express terms. By its express terms, it was clearly intended by the deed of settlement that the parties were preserving the first suit. The deed of settlement expressly preserved the plaintiff's right to file a fresh claim in court in the event a viable substitute land could not be found. It even stipulated the defendant's undertaking not to raise defences of limitation and/or laches against the filing afresh of the claim.

[150] We also agreed with learned counsel for the plaintiff that under of the deed of settlement the parties agreed to explore the possibility of resolving the plaintiff's claims against the defendant in the first suit. The terms of the deed of

A settlement did not require both parties to agree on the suitability of the alternate land offered and that by virtue of cll 2 and 3, the issue of suitability was solely that of the plaintiff.

B **[151]** We had already adverted to the events that led to the filing of the second suit and we do not wish to repeat them. It is crucial however, to examine the reasons for the second and subsequent extensions.

C **[152]** The second extension sought by the defendant was for a further six months from 30 December 2013. The reason being the relevant authorities have not finalise the matters pertaining to the substituted land. The plaintiff was agreeable to the defendant's request. The extension of time ended on 30 June 2014.

D **[153]** The third extension sought by the defendant was for a further six months from 30 June 2014. The State Land PTD 170107 and PTD 170708 Mukim Pulai, Daerah Johor Bahru, Johor Mukim Pulai land was the substitute land the defendant had in mind, in place of the Bukit Tempurung land. As Mukim Pulai land was a State Land, the defendant made an application to the E Pentadbir Tanah Johor Bahru for the alienation. The defendant informed the plaintiff of the application by a letter dated 15 January 2014. The application however entailed a long process including obtaining the views of UPEN and for the PTG to relook into the application and the requirement imposed on the F defendant to prepare the concept development proposal for the Mukim Pulai land. The deed of settlement was eventually extended until 30 December 2014.

[154] It is of significant importance to note the defendant's explanation to the PTG in making the application for Mukim Pulai land as stated in their letter G dated 2 September 2014, the excerpt of which is reproduced below:

> Untuk makluman, izinkan kami memberi makluman berkaitan latar belakang tapak. Pada 2011 KPRJ telah menandatangani satu perjanjian yang disebut sebagai 'deed of settlement' bersama pihak Bitara Mawar Sdn Bhd (BMSB) yang memberikan hak membangunkan tanah HS (d) 494707 PTD 7100. Pada asalnya H BMSB telah diberi hak membngunkan tanah Metro Larkin 1 seluas 14.316 ekar (bersebelahan Stadium Tan Sri Dato' Haji Hassan Yunos) melalui Perjanjian Pembangunan yang dimeteraikan pasa 2 Ogos 1997. BMSB pula melantik Emercon Consolidated Sdn Bhd (ECSB) sebagai turnkey kontraktor untuk membangunkan tanah ini.
>
> I Walaubagaimanapun pada Ogos 2005, KPRJ telah diarahkan oleh pihak Kerajaan Negeri untuk memindah milik tanah Merto Larkin 1 kepada pihak Johor Corporation bagi tujuan pemulihan Amanah Saham Johor (ASJ) DAN Dana Johor (DJ). Lanjutan daripada out, ECSB telah mengambil tindakan mahkamah terhadap KPRJ. Sebagai penyelesaian, BMSB diberi hak membangunkan tanah PTD 7100 Mukim Jelutong.

Lawatan Mantan Y.A.B Menteri Besar Johor (Y.A.B.) Dato Hj Abdul Ghani Othman) ke kawasan Parlimen Gelang Patah pada tahun 2011 telah menjanjikan kurniaan hakmilik tanah kepada penduduk-penduduk setinggan Kg Wawasan dan Kg Melayu Baru. Lanjutan daripada itu, Lembaga Pengarah KPRJ bertarikh 16 Disember 2012, telah meluluskan untuk menyerahbalik keseluruhan tanah HS(D) 494707 PTD 7100, Mukim Jelutong, Daerah Johor Bharu seluas 65 ekar kepada Kerajaan Negeri untuk dikurniakan kepada penduduk setinggan dengan syarat setelah tapak ganti dikenalpasti dan diluluskan oleh pihak Kerajaan Negeri. *(Bersama-sama ini juga disediakan kronologi permohonan tanah untuk rujukan).*

Oleh itu berdasarkan penerangan dan kronologi di atas, pihak kami ingin mencadangkan agar tanah PTD 170107 dan PTD 170108 seluas 25.20 EKAR, Mukim Pulai dipilih sebagai tanah gentian tersebut. *Kurniaan ini akan membolehkan pihak kami dapat menyelesaikan 'deed of settlement' di antara pihak KPRJ dan BMSB.*

...

Walau bagaimanpun sekiranya, pihak Kerajaan Negeri memutuskan untuk mengurniakan tanah yang dipohon ini kepada pihak agensi lain, pihak KPRJ memohon pihak Kerajaan mensyaratkan agar pihak tersebut menandatangani perjanjian pengambilalihan (Deed of Novation) dengan pihak BMSB mengenai pengambilalihan semua tanggungan dan tanggungjawab syarikat daripada BMSB. Di samping itu, pihak Kerajaan Negeri juga perlu mensyaratkan pihak BMSB membatalkan hak untuk menuntut sebarang gantirugi ke atas penamatan perjanjian dengan pihak KPRJ. (Emphasis added.)

[155] The above excerpt demonstrates the defendant's strenuous efforts to settle the second suit to the extent of asking the MMKN 'mensyaratkan pihak BMSB membatalkan hak untuk menuntut sebarang gantirugi ke atas penamatan perjanjian dengan pihak KPRJ'.

[156] The fourth extension sought by the defendant was for a year from 30 December 2014 until 30 December 2015. The reason given was that the relevant authorities had not finalised the matters pertaining to the substitute land. The plaintiff consented to the request. The expiry date would then be 30 December 2015.

[157] Turning back to the application for the Mukim Pulai land, UPEN proposed to the defendant by a letter dated 4 February 2015 that the Mukim Pulai land be developed by way of privatisation between the state government, the Perbadanan Setiausaha Kerajaan Johor and one entity to be nominated by the defendant.

[158] The plaintiff was willing to be nominated. They were eventually named by the defendant for the proposed privatisation development.

A **[159]** Thereafter, on a number of occasions, the documentary evidence showed that UPEN dealt directly with the plaintiff with the correspondences copied to the defendant. It must be borne in mind that all these while, the Mukim Pulai land had not been alienated to the defendant. What was going on between the parties only relate to the proposed privatisation development.

B

[160] The proposed Mukim Pulai land did not materialise. The plaintiff told UPEN and the defendant by letter dated 18 June 2015 that in their opinion Mukim Pulai land was not a suitable and viable for development.

C

[161] The defendant did not say that the plaintiff's grounds for rejecting Mukim Pulai land was unreasonable or unjustified.

[162] Instead, the defendant requested for another one year extension of time
D until 30 December 2016 (see letter dated 19 November 2015) as 'Sebagaimana yang pihak YBhg Datuk sedia maklum, perkara berhubung dengan tanah ganti kepada pihak plaintif masih belum dimuktamadkan sehingga kini'.

[163] The plaintiff did not accede to the request for a year but was agreeable
E to extend time for another six months, ie to 30 June 2016. This was the fifth extension.

[164] By a letter dated 15 December 2015, the defendant informed the
F plaintiff that they had forwarded application for State Land PTD 7327, Mukim Jelutong, Daerah Johor Bahru (Mukim Jelutong land).

[165] However, barely three months later the defendant informed the plaintiff that the Mukim Jelutong land had been approved by the MMKN for another
G party. The defendant suggested as a replacement, PTD 115592, Mukim Plenton, Daerah Johot Bahru with an area of approximately 133.52 acres. The land is situated in Kawasan Pembangunan Iskandar Malaysia.

[166] The plaintiff said they would conduct a feasible study to determine its
H suitability. The plaintiff found the proposed replacement land not viable due to land — related problems and technical issues — 'isu keluar masuk dan parit rizab JPS' (see the plaintiff's letters dated 1 April 2016 and 20 May 2016

[167] The defendant did not refute the plaintiff's assertions. In law, they were
I deemed to accept the truth of the matter.

[168] Another six months extension was sought by the defendant in a letter dated 26 June 2016, stating 'Sebagaimana yang YBhg Datuk sedia maklum,

perkara berhubung dengan tanah ganti kepada pihak Ybhg. Datuk selaku Plaintiff masih belum dimuktamadkan'. A

[169] Evidently, from the aforesaid, in particular the defendant's letter to PTG dated 2 September 2014, the defendant persisted in pursuing the deed of settlement to settle the plaintiff's claims in the second suit. B

[170] At all stages, explanations were given by PW5 as to why all the lands offered by the defendant were found not suitable and viable. There was no objection raised at any material time for the plaintiff's non-acceptance. The documentary evidence clearly showed that the defendant had unequivocally accepted the plaintiff's explanations. PW5's explanation was not challenged in cross examination. None of the defendant's witnesses had stated or even suggested that the rejection of the lands offered were unreasonable. Needless to say, there was clear admission by the defendant that they had not been able to procure a suitable substitute land even after several extensions of time. C D

[171] Given the above factual circumstances, inevitably, one could only arrive at the only irresistible conclusion, that is the deed of settlement was an admission by the defendant of their obligations to the plaintiff under, and of its breach of, the development agreement. There was simply no reason why the defendant would have gone to such an extent to procure substitute lands, as the narration above show, if it was not to settle the plaintiff's claim against them for the breach of the development agreement. E F

[172] We shall now deal with the defendant's issue of frustration.

[173] The law on the frustration of contracts in Malaysia is contained in s 57(1) and (2) of the Contracts Act 1950. G

[174] There are established legal principles governing frustration of contract decided in our courts (*Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257; [1983] 1 CLJ 73; *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256; [1984] 1 CLJ Rep 181; *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293, *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; *Gan Jin Sim @ Gan Gim Sim (as administrator of the estate of Gan Lai Kim, deceased) v Swi Chuan @ Nan Swu Chuan & Ors* [2017] 1 MLJ 794 and *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699). H I

[175] From the case authorities cited above, it is settled law that there has to be a supervening event which rendered the contract impossible or unlawful to perform and not one brought about by an act of the party itself. The latter is

called 'self-induced frustration which is not recognized in law as a genuine case of frustration. The event which causes frustration must have occurred without the fault of either party. Self-induced frustration is no frustration and is ineffective.

[176] The defendant contended that the two events set out below qualified as supervening events which has frustrated the development agreement or are they not self induced frustration:

(a) the rejection the application for surrender and re-alienation of the project land; and

(b) the transfer of the project land to Johor Corp,

over which they had no control.

[177] The learned JC had found and we think correctly, that the defendant could not anchor their case on the ground of frustration.

[178] Learned counsel for the defendant cited the Court of Appeal case of *Ng Kheng Yong @ Ng Tet Lai v Seng Hup Realty Co Sdn Bhd* [2004] 3 MLJ 477 in support of their contention that the development agreement had been frustrated by the rejection of the application. We are of the view that reliance on *Ng Kheng Yong* is inappropriate for these reasons.

[179] The Court of Appeal in that case held that the parties entered into the agreement which depended upon a possible approval for conversion and subdivision to be forthcoming from the PTG based upon the original layout plan. The original layout plan annexed to the agreement formed an integral part of the agreement and cannot be severed. As both parties have agreed that no variation of the approved layout plan annexed to the agreement, ie, the original layout plan shall be permitted except with the written approval of both parties, and the appellants submitted the application together with the original layout plan which the parties had agreed to and that application was rejected, the appellant had performed by doing all that was required of him. The foundation upon what the parties have deemed to have had in contemplation had dissipated when the application for conversion and subdivision was rejected. This would be a ground on which to rest the doctrine of frustration.

[180] The facts in the present case differed. When the application submitted by the defendant was rejected, the matter could not end there like in *Ng Kheng Yong*. This is because the defendant had agreed to take all positive and/or reasonable steps to procure the surrender and re-alienation of the project land prior to the development, more so when the defendant acknowledged that the rejection was based purely on an incorrect assumption over the zoning of the

project land. The chairman of the meeting of the SPC on 12 February 2001 and meeting of the Jawatankuasa Hasil Bumi on 18 April 2001 was the defendant's chairman, the MB. The defendant should have taken up the advice by PTG to appeal to the MB or to meet up with Johor Corp as suggested by UPEN.

[181] All these events spanned over a period of almost a year, from the date of submission of the application on 30 August 2000 until the date of the defendant's response to the plaintiff's request for the defendant to meet Johor Corp on 29 August 2001. It is crucial to note that at this material time, there was no evidence whatsoever to suggest that the rejection had anything to do with the MMKN's decision on 29 March 2000. The PTG would not have given advice and UPEN would not have made any suggestion to the defendant pertaining to the project land, if the MMKN's decision dated 29 March 2000 was to have any bearing at the material time. The indication by the two State Government competent authorities was that the matter could be reconsidered. We therefore could not concede that the rejection of the application for surrender and re-alienation of the project land was entirely through no fault of theirs and qualified as a supervening event.

[182] Then came the MMKN's decision on 12 December 2001.

[183] It is evidently clear that the real reason for the decision to transfer the project land was for financial gain. The development agreement was considered not the best bargain for the defendant because it was commercially more beneficial to break the contract and opt for a transfer of the project land to Johor Corp in consideration of its debt of RM70m to Affin Bank being settled in full by Johor Corp. This is as opposed to a possible anticipated profit of RM34m on a successful completion of the said project.

[184] As the MB was the also the defendant's chairman, it cannot be understated that the MMKN was fully appraised of the defendant's contractual obligations under the development agreement and the far reaching effect the MMKN's decision on 12 December 2001 could have on the plaintiff. The project lands belonged to the defendant. There was nothing in the title to state that the defendant was bound to transfer the project land or to retransfer it out on the instruction of the MMKN. Pursuant to section 3.2(1)(f) of the development agreement, the defendant had covenanted not to permit to be done any act matter or thing which may in any manner interfere with the development of the project.

[185] *Yee Seng Plantations Sdn Bhd* is a case on point. In that case, the appellant and the respondents had entered into a consent order whereby the State Executive Committee (Exco) rejected the appellant's application for the

alienation of the land referred to in the consent order. The Court of Appeal held that the refusal of the Exco to alienate the lands in question contrary to the terms of the consent order was a deliberate act of non-compliance of the consent order and it was not a supervening event and the respondents could not rely on the doctrine of frustration. In the present case, given the factual circumstances, the MMKN's decision that culminated in the transfer of the project land to Johor Corp, directly interfered with the rights and interest of the plaintiff, and was made in total disregard of the defendant's contractual obligations with the plaintiff, under the development agreement. The defendant would have been fully aware of such consequences. The defendant should have resisted the MMKN's direction and continued to maintain the stance taken when they wrote to UPEN on 9 May 2001 and the reassurance they had given the plaintiff on 29 August 2001. The MMKN and the defendant are separate legal entities. The defendant was under no legal obligation to transfer the project land simply because they were told to do so by the MMKN. But they went ahead with the transfer and levelled blame on the MMKN's directive to be a supervening event. The direction of the MMKN, like the Exco's decision in *Yee Seng Plantations Sdn Bhd*, was not a supervening event.

[186] If the defendant felt they were bound to follow the MMKN's directive, which they did in this case, they did so at their own peril. It was the defendant which had refused to perform their end of the bargain by self-induced frustration (see also *BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and another appeal* [2018] 3 MLJ 326). They cannot avail themselves of the defence of frustration.

DAMAGES

[187] Section 74 of the Contracts Act 1950 governs the law on compensation for loss or damage caused by breach of contract. The Supreme Court in *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76; [1993] 2 CLJ 495 held that s 74 is declaratory of the common law rules as to assessment of damages in contract enunciated in *Hadley v Baxendale* (1854) 9 Exch 341 (see also *Tara Rajaratnam v Datuk Jagindar Singh & Ors* [1984] 1 MLJ 175; *Nikmat Masyhur Sdn Bhd v Kerajaan Negeri Johor Darul Ta'zim* [2014] 1 MLJcon 213; [2008] 9 CLJ 46).

[188] It is trite law that the general principle for the assessment of damages is compensatory. The Federal Court in *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465 at p 475 held that the object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered. The Apex court quoted the principle as to damages enunciated by Lord Blackburn in

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, who said that the measure of damage is '… that sum of money which will put the party who has been injured, or who has suffered, in the same position he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' (see also s 74 of the Contracts Act 1956, *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633; *Bank Bumiputra Malaysia Bhd Kuala Terengganu*, *Nikmat Masyhur Sdn Bhd*

[189] The plaintiff has the burden of proving the damages they claimed. In *Bank Bumiputra Malaysia Bhd Kuala Terengganu,* the Supreme Court held that once the claimant has proved that the kind of damages suffered was foreseeable then the guilty party is liable to the full extent of it whether foreseeable or not provided that the extent of the damages claimed has been established on the balance of probabilities. In other words, it would not be sufficient for a claimant to merely show that the extent of damage alleged was merely possible.

[190] What is the measure of damages then? In *Tara Rajaratnam* Abduk Razak J (as he then was) said at p 176 that in contract, the measure of damages is the market value of the benefit which the plaintiff had been deprived through the breach. The plaintiff in other words is entitled to loss of his bargain. The object is to put the plaintiff in the position as if the contract had been performed (*Mogregor on Contract* (13th Ed) p 21).

[191] The learned JC had assessed damages on the basis of loss of profit. Reliance was made on the case of *Nikmat Masyhur Sdn Bhd*, a case on point where the facts were similar to the facts herein. The learned JC accepted PW5's testimonies that the loss of profit suffered by the plaintiff was estimated at RM51,263,010. At the same time, he also found that based on the evidence of the registered valuer (PW1) and quantity surveyor (PW2), the loss of profit was assessed at RM50,215,120.

[192] Learned counsel for the defendant submitted that the learned JC had plainly proceeded on the wrong basis as the plaintiff were not entitled to claim loss of profit for the following reasons:

(a) the inability of the plaintiff to do the development with regard to project land by reason of the application for the project land to be developed had been refused by the MMKN from the outset; and

(b) by the deed of settlement, the plaintiff had accepted that the project land was no longer available for development.

[193] We had already canvassed the abovementioned reasons at length. As things stand, it suffice to say that the defendant could not rely on those reasons to contend that the plaintiff are not entitled to the loss of profit.

[194] Learned counsel for the defendant cited a long line of cases to support the argument as to why the plaintiff should not be entitled to loss of profit. We summarised the submission as follows:

(a) whether the defendant led any rebuttal evidence is completely irrelevant, as the burden of proving damages lies with the plaintiff. PW1 and PW2's assessment of loss of profit does not prove that the plaintiff had indeed suffered loss of profit. The assessment was made without any evidence by the plaintiff of the market condition for such development and the plaintiff's ability to sell the units as a result to justify the plaintiff's claim for loss of profit. Reliance was made on the Court of Appeal case of *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411 and *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 171;

(b) based on the Court of Appeal case of *Sime UEP Properties Bhd v Woon Nyoke Lin* [2002] 3 CLJ 719), the plaintiff must prove actual loss a result of the breach and a projection was not sufficient to establish the would be losses of profit. The plaintiff's claim for loss of profit was purely speculative;

(c) the plaintiff's claim was too remote and untenable and therefore must be rejected based on *Bank Bumiputra Malaysia Bhd Kuala Terengganu*;

(d) in *Bank Muamalat Malaysia Berhad v Sophisticated Pipe Industry Production Sdn Bhd* [2011] 9 CLJ 748, it was held that a forecast is only an estimation which is nothing more than a mere speculation, conjecture or projection which is not sufficient to prove loss of profits. No audited accounts had been tendered to support the claim. There was no supporting evidence to show how the figures in the said estimation was arrived at. There was also no evidence shown as to the prospect of achieving the future projected income as claimed;

(e) on the basis that there was some liability for breach of contract, the learned JC ought to have awarded damages, if at all, on the basis of wasted expenditure (*Wallington v Townsend* [1939] 2 All ER 225). In the present case, since the plaintiff did not pursue that measure of damages, there was hardly any evidence relating to what expenditure the plaintiff did expend; and

(f) in light of the plaintiff's failure to properly adduce sufficient evidence to sustain the plaintiff's case on the appropriate quantum, the learned JC ought to have only allowed nominal damages.

[195] The common law rule affecting the measure of damages was propounded by the Federal Court in the case of *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39; [1967] 1 LNS 197 and summarised in *Nikmat Masyhur Sdn Bhd* in these words:

> [7] In short, the common law rule in the assessment of damages consists of two limbs. The first limb concerns damages flowing naturally, ie, in the normal course of things from the breach. The second limb concerns the damages that the parties at the time of the making of the contract may reasonably be supposed to have contemplated, as the probable result of the breach.

[196] In assessing their loss of profit, the plaintiff made their own assessment based on the contract between the parties. The other was the assessment and estimation by PW1 and PW2.

[197] We agreed with learned counsel for the plaintiff that the plaintiff's profit from the development was well within the contemplation of the defendant. The plaintiff was obligated pursuant to the development agreement to give the defendant a bank guarantee to guarantee the defendant's full amount of the project consideration.

[198] Arising from the commitment of both parties, the development agreement was amended twice. The second amendment was sometime in October 1998, where the development project was amended from 100% commercial development to mixed development of commercial and residential. In this mixed development, the defendant's project consideration was RM34,233,788 based on 12% of the project revenue projected at RM285,281,570.40.

[199] The plaintiff's own computation of RM51,263,010 was based on the evidence of PW5 which stood unrebutted and documentary evidence namely Bitara's letter dated 9 September 1998 and the defendant's letter dated 21 October 1998. There was no challenge that the loss of profit was based on the development of the said project which was in accordance with the layout plan and development components that were prepared together with estimated selling price, projected development cost and projected sales revenue all of which was agreed to by the defendant.

[200] From the evidence led, the plaintiff's own projected profit and the defendant's project consideration were computed as follows:

(a) revenue from projected sales — RM285,281,570;

(b) total revenue — RM277,293,570;

(c) total profit (revenue minus development cost of RM191,796,722) — RM85,496,798;

(d) from the total profit of RM85,496,798, the defendant would receive their guaranteed project consideration of RM34,233,788; and

(e) the plaintiff would receive RM51,263,010 (RM85,496,798 – RM34,233,788).

[201] The defendant had without qualification, agreed to the computations. The projected figures was from the inception, ie from the year 1998. Thus, it is not open to them now to submit that the assessment was speculative and conjecture or projection which is not sufficient to prove loss of profits. Unlike *Bank Muamalat Malaysia Berhad,* there was supporting evidence to show how the figures in the said assessment and estimation were arrived as found in the development agreement and the relevant documents thereto and exhs P1–P4.

[202] In addition, there was never a condition imposed by the defendant to state that the assessment they had agreed to would be subject to the market condition for such development and the plaintiff's ability to sell the units. The defendant could have rejected the plaintiff's assessment because at the end of the day, being an entity wholly owned by the state government, they would have the edge over the matter. Thus, the plaintiff's claim could not at any rate be considered remote or untenable. Rather, the profit the plaintiff would have been entitled to was something which the defendant had agreed to consciously and with full awareness of the facts and figures. On that basis, it is amply clear that the loss of profit the plaintiff would suffer was the natural and probable result of the defendant's breach of the development agreement (see *Bank Bumiputra Malaysia Bhd Kuala Terengganu*). The loss of profit claimed by the plaintiff was reasonably contemplated by the defendant at the time of the making of the contract. There was no evidence adduced by the defendant to the contrary. The defendant must be estopped from changing course.

[203] Then there was PW1 who was appointed by the plaintiff to determine the estimated market value of the development components in the said project and to verify that the proposed selling price for each component was reasonable. He concluded that the plaintiff's selling price for each component in the proposed development was reasonable (the valuation reports were marked as exhs P1 and P2).

[204] PW2 prepared evaluation reports on the projected profits from the proposed development project (the evaluation reports were marked as exhs P3 and P4). PW2's reports showed that the cost of construction for the development project was RM193,302,000 while the projected profit was RM83,422,000. Thus, the plaintiff's loss of profit stood at RM50,215,120. In *Bank Bumiputra Malaysia Bhd Kuala Terengganu,* the Supreme Court accepted the evidence of a quantity surveyor to assess the loss of profit for a proposed development project.

[205] The defendant's submission that whether the defendant led any rebuttal evidence to exhs P1-P4 was of no consequence, is certainly misplaced. The learned JC had, in accepting exhs P1-P4 which were the evidence available before him and which were not challenged or contradicted by any report from the defendant, had correctly applied the decision of the Court of Appeal in *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171 where it held that a judge who is not an expert should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts. As there was only one expert opinion, the judge should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and is not supported by the basic facts.

[206] We could find no error of judgment on His Lordship's finding that the plaintiff had proven that they were entitled to loss of profit. His Lordship accepted the loss of profit as assessed by PW2 at RM50,215,120.

[207] However, we accept that the learned JC was plainly in error when, after he had made a finding that the lower sum of RM50,215,120 as loss of profit was proven, he proceeded to revise downwards the loss of profit by one-half.

[208] In undertaking the adjustment, the learned JC had taken into account factors that were irrelevant, unproven, speculative and not raised at trial and in wrongly invoking judicial notice of there being the high possibility of slow sales due to glut or oversupply in Johor Bharu market. The adjustment clearly contradicted his earlier finding. The error committed by the learned JC warranted our appellate intervention.

[209] As mentioned earlier, we had dismissed Appeal No 329 and allowed Appeal No 330, both with costs. The award of RM50,215,120 carried interest at the rate of 5%pa from the date of the judgment (15 January 2018) until full realisation. We order the defendant to pay the plaintiff costs of RM40,000 in respect of Appeal No 329 and RM20,000 in respect of Appeal No 330. The costs are subject to allocator.

Appeal No 329 dismissed and appeal No 330 allowed.

Reported by Nabilah Syahida Abdullah Salleh